Supreme Court, U.S.
FILED
OCT 27 1994
CLERK

NO. 94-603

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MARIE BLACK, INDIVIDUALLY AND AS REPRESENTATIVE OF RANDY BLACK, PAM BLACK GUMM, KITTY BLACK, ADULTS AND WILLIAM BLACK AND TAMMY BLACK, MINORS, THE SOLE AND ONLY HEIRS-AT-LAW OF ROMIE BLACK,

Petitioner,

versus

J. I. CASE,

Respondent.

Respondent J. I. Case's Brief In Opposition To Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

*JOHN S. HILL
DONNA M. BARNES
MITCHELL, MCNUTT, THREADGILL, SMITH & SAMS, P.A.
Attorneys at Law
Post Office Box 7120
Tupelo, MS 38802-7120
(601) 842-3871
Attorneys for Respondent J. I. Case

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON D.C. (202) 347-8203

QUESTION PRESENTED

1. Whether, in light of no meaningful conflict among the circuits on the issue, the holding by the United States Court of Appeals for the Fifth Circuit that the district court's denial of summary judgment was not reviewable on appeal where there had been a subsequent trial on the merits and a jury verdict adverse to the movant is in error.

*2. Is it proper to deny a motion for summary judgment when the party opposing the motion has not offered any factual evidence, by way of affidavit or otherwise, in opposition of the motion?

*3. Is the rule applied by the United States Court of Appeals for the Fifth Circuit, refusing to hear appeals of denials of motions for summary judgment, to be applied prospectively or retroactively?

*4. Is the grant of partial summary judgment in any way procedurally distinct from the denial of summary judgment so that the grant of partial summary judgment may be reviewed on appeal and denial of summary judgment may not?

---

*Although questions 2-4 were raised, the petitioner failed to address them in the Petition for Writ of Certiorari. Thus, the respondent answers in summary fashion. The second question presented is a mischaracterization of the

evidence by the petitioner. Although not part of the record, several items of evidence were offered in opposition to the petitioner's summary judgment motion: (a) copy of a work order; (b) Supplemental Response to Interrogatories Propounded to the Defendant by the Plaintiffs; (c) David Ray deposition; (d) Randy Alan Black deposition; and (e) Logan Cloud deposition. Further, it is clearly the movant's responsibility to prove that he is entitled to judgment as a matter of law, Celotex Corp v. Catrett, 477 U.S. 317 (1986), and the district court noted correctly that the movant failed to do so. The court concluded that " . . . the defendant has more than sufficiently met its burden by presenting evidence in its favor on each of plaintiffs' theories of recovery." [Petition for Writ of Certiorari at 34-35]. The third question presented is essentially a question for the Fifth Circuit to determine. Unfortunately for the petitioner, she did not ask for a rehearing. In any event, this question is phrased in misleading terms in that this "rule" has been followed by the Fifth Circuit for years. See Zimzores v. Veterans Admin., 778 F.2d 264, 267 (5th Cir. 1985); Wells v. Hico ISD, 736 F.2d 243, 251 n.9 (5th Cir. 1984). Therefore, whether or not the rule should be applied prospectively or retroactively is moot. Finally, the fourth question presented has little merit since it is well established that a grant of summary judgment is reviewable. The principal reason is that such a grant takes the case away from the jury. The distinction here is that petitioner, whose motion was denied, saw her case travel through a full trial on the merits, eventually decided by an unbiased jury. Thus, the question of whether summary judgment should have been denied is now moot.

TABLE OF CONTENTS

Page

OPINIONS AND ORDERS BELOW 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 5

A. There is Currently no Meaningful Conflict Among the Circuits 5

B. Even the Holley Ruling Would Not Warrant a Review of Petitioner's Denied Summary Judgment Motion 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases Page

Albatross Shipping Corp. v. Stewart, 326 F. 2d 208 (5th Cir. 1964) 4

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 6

Barhold v. Rodriguez, 863 F.2d 233 (2nd Cir. 1988) . 9

Black v. J.I. Case, 22 F.3d 568 (5th Cir. 1994), petition for cert. filed, (Aug. 24, 1994) (No. 94-603) 2

Black v. J.I. Case, 973 F.2d 1226 (5th Cir. 1992), vacated, 22 F.3d 568 (5th Cir. 1994) 2, 4

Bottineau Farmers Elevator v. Woodward-Clyde, 963 F.2d 1064 (8th Cir. 1992) 6

Boyles Galvanizing & Plating v. Hartford Acc. & Ind., 372 F.2d 310 (10th Cir. 1967) 6

Celotex Corp v. Catrett, 477 U.S. 317 (1986) ii

Glaros v. H.H. Robertson Co., 797 F.2d 1564 (Fed. Cir. 1986), cert. dismissed, 479 U.S. 1072 (1987) 6

Holley v. Northrop Worldwide Aircraft Serv., 835 F.2d 1375 (11th Cir. 1988) 8-10

Jarrett v. Epperly, 896 F.2d 1013 (6th Cir. 1990) 6, 10

TABLE OF AUTHORITIES CONTINUED

Cases — Page

Lama v. Borras, 16 F.3d 473 (1st Cir. 1994) . . . 6-7, 10

Locricchio v. Legal Serv. Corp., 833 F.2d 1352 (9th Cir. 1987) 7-8

Lum v. City & County of Honolulu, 963 F.2d 1167 (9th Cir. 1992), cert. dismissed, 113 S.Ct. 659 (1992) 6

Satcher v. Honda Motor Co., 984 F.2d 135 (5th Cir. 1993), vacated, 993 F.2d 56 (5th Cir. 1993) 4

Satcher v. Honda Motor Co., 993 F.2d 56 (5th Cir. 1993) 4

Savarin Corp. v. National Bank of Pakistan, 447 F.2d 727 (2nd Cir. 1971) 8

Switzerland Cheese Assoc. v. Horne's Market, 385 U.S. 23 (1966) 6

Watson v. Amedco Steel, 29 F.3d 274 (7th Cir. 1994) 6-7, 10

Wells v. Hico ISD, 736 F.2d 243 (5th Cir. 1984), cert. dismissed, 473 U.S. 901 (1985) ii

Woods v. Robb, 171 F.2d 539 (5th Cir. 1948) 7

Zimzores v. Veterans Admin., 778 F.2d 264 (5th Cir. 1985) ii

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NO. 94-603

MARIE BLACK, INDIVIDUALLY AND AS REPRESENTATIVE OF RANDY BLACK, PAM BLACK GUMM, KITTY BLACK, ADULTS AND WILLIAM BLACK AND TAMMY BLACK, MINORS, THE SOLE AND ONLY HEIRS-AT-LAW OF ROMIE BLACK,

Petitioner,

versus

J. I. CASE,

Respondent.

Respondent J. I. Case[1] respectfully requests that this Court deny the Petition for Writ of Certiorari to review the United States Court of Appeals for the Fifth Circuit's affirmance of the underlying case.

OPINIONS AND ORDERS BELOW

The May 10, 1991, order and opinion of the United States District Court for the Northern District of

---

[1] J.I. Case is a Delaware corporation wholly owned by Teneco, Inc., a Delaware corporation. J.I. Case has no subsidiary companies.

Mississippi, Eastern Division, denying petitioner's partial summary judgment motion are unreported and reproduced in the Petition for Writ of Certiorari at 26-35. An appeal was initially considered by the United States Court of Appeals for the Fifth Circuit on October 1, 1992, in a memorandum opinion reported at 973 F.2d 1226 (5th Cir. 1992) and reproduced in the Supplemental Appendix. This opinion was subsequently withdrawn and vacated on December 9, 1992. The May 27, 1994, memorandum opinion of the United States Court of Appeals for the Fifth Circuit is reported at 22 F.3d 568 (5th Cir. 1994) and is reproduced in the Petition for Writ of Certiorari at 11-23. Petitioners failed to petition for rehearing or seek reconsideration by the Fifth Circuit en banc.

STATEMENT OF THE CASE

The petitioner's wrongful death action against respondent J. I. Case was originally filed in the Circuit Court of Lee County, Mississippi on March 26, 1990.[2] Respondent removed the case to The United States District Court for the Northern District of Mississippi,

---

[2]On September 13, 1986, Romie Black was killed while operating a model 580-D backhoe loaned to him by J. I. Case when the backhoe rolled over, causing fatal injuries to Mr. Black's head. [T. 49, 56, 207-08]. It should be noted that the petitioner assumed certain facts in the "Statement of the Case" part of the Petition for Writ of Certiorari that were disputed by the respondent, and which the trial jury resolved in favor of the respondent. For example, the petitioner states that the accident resulted from the failure of a seat locking mechanism. [Petition for Writ of Certiorari at 2-3]. The trial jury agreed with the respondent and repudiated this theory of the cause of the subject accident.

Eastern Division, alleging jurisdiction based upon complete diversity of citizenship.

On January 4, 1991, the petitioner filed a motion for partial summary judgment as to liability for breach of an implied warranty of merchantability, failure to warn of latent defects, failure to instruct Black on the safe operation of the backhoe, and failure to inspect. On January 18, 1991, the respondent filed its Response to Plaintiff's Motion for Partial Summary Judgment, along with its Memorandum of Authorities in Opposition to Plaintiff's Motion for Partial Summary Judgment. On May 10, 1991, the district court denied petitioner's motion. The court found that the evidence created factual disputes with regard to each ground for summary judgment. Subsequently, the case was fully tried on the merits for three days. The petitioner then moved for a directed verdict at the close of all the evidence. The court denied this motion and the jury returned a favorable verdict for the respondent. Finally, the petitioner appealed the district court's denial of her motion for partial summary judgment to the United States Court of Appeals for the Fifth Circuit.[3]

On October 1, 1992, the Fifth Circuit delivered its first opinion holding that the denial of summary judgment cannot be reviewed after a final judgment on the merits is entered adverse to the movant. [See Supplemental Appendix at 6a].

---

[3]The petitioner also argued that the district court erred in several other respects. However, the Fifth Circuit found that these remaining issues were without merit, and they were not raised in the Petition for Writ of Certiorari.

The Fifth Circuit later withdrew and vacated this opinion, replacing it with a decision reported at 22 F.3d 568.[4] However, the same result was reached.[5] The Fifth Circuit reiterated that it will not review the pretrial denial of a motion for summary judgment after a full trial on the

---

[4]Apparently, the withdrawal was due to a perceived conflict with Satcher v. Honda Motor Co., 984 F.2d 135 (5th Cir. 1993) in which the Fifth Circuit reviewed and reversed the district court's denial of summary judgment after the movant received an adverse judgment following a trial on the merits. However, that opinion was vacated and withdrawn and replaced by Satcher v. Honda Motor Co., 993 F.2d 56 (5th Cir. 1993) in which the Fifth Circuit does not address the issue of whether a denied summary judgment motion should be reviewed on appeal after a full trial on the merits. Thus, the court concluded that there is no conflict within its circuit regarding this issue. Notably, the petitioner cites Albatross Shipping Corp. v. Stewart, 326 F.2d 208 (5th Cir. 1964) as authority for the proposition that there is a conflict within the Fifth Circuit on this issue. However, Albatross dealt with the review of a granted motion which is concededly distinct from the issue at hand. In any event, the petitioner has failed to seek a rehearing en banc which is the appropriate route for an appellate court to resolve an alleged intracircuit conflict.

[5]In the Petition for Writ of Certiorari, the petitioner argued that even the circuits relied upon in the Fifth Circuit's opinion, including the Fifth Circuit itself, will review other interlocutory orders on appeal from final judgment. This argument is meaningless because we are not concerned with other interlocutory orders. Further, the petitioner fails to articulate a rationale for why a denial of summary judgment or any other interlocutory order should be reviewable.

merits is entered adverse to the movant.[6] However, the court cautioned that its ruling did not extend to all cases in which summary judgment was denied.[7]

REASONS FOR DENYING THE WRIT

A. *There is Currently no Meaningful Conflict Among the Circuits*

The United States Supreme Court has previously stated that "[t]he denial of a motion for a summary judgment because of unresolved issues of fact does not

---

[6]The court reasoned that reviewing the denial of a summary judgment motion would circumvent the established rule that a party who received an adverse judgment cannot be granted a j.n.o.v. unless he moved for a directed verdict in the district court. In other words, such review would allow the appellate court to reverse even if no motions for directed verdict and j.n.o.v. had been made at trial. "If such motions have been made, their denial can be reviewed on appeal and there is no good reason to also review the pretrial denial of the same party's motion for summary judgment." [Petition for Writ of Certiorari at 18]. As additional support for its position, the court opined that such a review would restrict the district court's discretion, and it would lead to the unacceptable result of reversal due to insufficient evidence at summary judgment even if the trial evidence was sufficient.

[7]The court stated that it was not dealing with qualified immunity cases or cases where a contemporaneous grant of summary judgment is being reviewed. Nonetheless, it should be noted that the petitioner continuously cited many of these cases as authority for her position in the Petition for Writ of Certiorari.

settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing -- that the case should go to trial." Switzerland Cheese Assoc. v. Horne's Market, 385 U.S. 23, 25 (1966). However, the trial judge's right to deny summary judgment does not imply that he can do so for the sole reason of hearing the case. Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986). Rather, the trial judge must determine that the evidence in the record does not support a reasonable jury finding in favor of the movant. Anderson, 477 U.S. at 255.

The Fifth Circuit's view that a denial of summary judgment is not reviewable after final judgment is entered adverse to the movant is followed by those circuits ruling directly on this issue. See Watson v. Amedco Steel, 29 F.3d 274, 276 (7th Cir. 1994)[8]; Lama v. Borras, 16 F.3d 473, 476 (1st Cir. 1994); Bottineau Farmers Elevator v. Woodward-Clyde, 963 F.2d 1064, 1068 n.5 (8th Cir. 1992); Lum v. City & County of Honolulu, 963 F.2d 1167, 1169-70 & n.1 (9th Cir. 1992); Jarrett v. Epperly, 896 F.2d 1013, 1016 n.1 (6th Cir. 1990); Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 & n.14 (Fed. Cir. 1986); Boyles Galvanizing & Plating v. Hartford Acc. & Ind., 372 F.2d 310, 312 (10th Cir. 1967).

The rationale for this position is simply that petitioner's attack on the denial of summary judgment has been overtaken by subsequent events, namely, a full three

---

[8]Watson clearly contradicts petitioner's statements in the Petition for Writ of Certiorari, contending that the Seventh Circuit will review all antecedent interlocutory rulings on appeal from the district court's final judgment.

day trial and an adverse jury verdict. See Lama, 16 F.3d at 476 n.5. Thus, at the time of appeal, the determination of whether or not summary judgment should have been granted generally becomes moot. Watson, 29 F.3d at 277. "After trial, the merits should be judged in relation to the fully developed record emerging from that trial. We will not at that point step back in time to determine whether a different judgment may have been warranted on the record at summary judgment."[9] Id. at 278.

A synopsis of the many reasons for not reviewing denied summary judgment motions was articulated by the Ninth Circuit in Locricchio v. Legal Serv. Corp., 833 F.2d 1352 (9th Cir. 1987):

> To be sure, the party moving for summary judgment suffers an injustice if his motion is improperly denied. This is true even if the jury decides in his favor. The injustice arguably is greater when the verdict goes against him. However, we believe it would be more unjust to deprive a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and

---

[9]Notably, the Fifth Circuit has espoused this view since 1948 when it stated "[t]he saving of time and expense is the purpose to be obtained by summary judgment in a proper case. When in due course the final trial is had on merits it becomes the best test of the rights of the movant. If he wins on the trial he has his judgment. If he loses on a fair trial it shows that he ought not to have any judgment." Woods v. Robb, 171 F.2d 539, 541 (5th Cir. 1948).

> affidavits at the time of summary judgment motion demonstrated the need for a trial. After considerable research, we have found no case in which a jury verdict was overturned because summary judgment had been improperly denied. We hold, therefore, that the denial of a motion for summary judgment is not reviewable on an appeal from a final judgment entered after a full trial on the merits.

Locricchio, 833 F.2d at 1359.

B. *Even the Holley Ruling Would Not Warrant a Review of Petitioner's Denied Summary Judgment Motion*

The Eleventh Circuit is the only one that is not directly in line with the rest of the circuits who have confronted this issue.[10] See Holley v. Northrop

---

[10]It should be noted that there is a twenty-three year old case out of the Second Circuit in which a denial of summary judgment was reviewed on appeal. See Savarin Corp. v. National Bank of Pakistan, 447 F.2d 727 (2nd Cir. 1971). After discussing the merits of the case, the court simply stated that "[t]he motion for summary judgment was properly denied." Id. at 732. This was the only reference to its review of the denied summary judgment motion, and no explanation was given. As a result, this case has been criticized by the other circuits who have considered this issue. Further, it appears that this court would probably fall in line with the other circuits who have considered this issue if confronted with it today. More recent cases have stressed the point that the only reason the Second Circuit reviewed the denial of summary judgment motions was

Worldwide Aircraft Serv., 835 F.2d 1375 (11th Cir. 1988). In Holley, the Eleventh Circuit stated that "[s]ummary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal; instead it was intended as a device to diminish the effort, time, and costs associated with unnecessary trials. In keeping with those purposes, we hold that the party whose motion for summary judgment was denied may not appeal the motion if the party admits that: (a) by trial the evidence produced by the opposing party was sufficient to be presented to the jury; or (b) by trial the evidence had been supplemented or changed in some manner favorable to the party who opposed summary judgment." Id. at 1377-78.[11]

---

due to the fact that they were accompanied by granted motions which are deemed by all circuits to be reviewable. The court stated that it does this for reasons of judicial economy, realizing that the issues presented by both motions are inextricably bound. Barhold v. Rodriguez, 863 F.2d 233, 237 (2nd Cir. 1988). Thus, through implication, it appears that if the Second Circuit was confronted today with the sole issue of whether a pretrial denial of summary judgment (unaccompanied by a granted motion) was reviewable after final judgment, the court may find that it is not.

[11] The Fifth Circuit tried to interpret the Eleventh Circuit's holding in Holley. [Petition for Writ of Certiorari at 16-17 n. 6]. The Fifth Circuit suggested that Holley supports a dual system for evaluating denied motions for summary judgment. "Under this dichotomy, if the motion were denied on 'factual' grounds (e.g., no evidence as to an element required under governing law), then the order should not be reviewable. However, if the motion were denied on 'legal' grounds (e.g., the elements that must be proven under governing law), then that determination should be reviewable."

The Eleventh Circuit is not really in conflict with the other circuits' position. For example, Holley has been cited in numerous cases as authority for the proposition that denied summary judgment motions should not be reviewed on appeal of final judgments. See, e.g., Watson, 29 F.3d at 276; Lama, 16 F.3d at 476; Jarrett, 896 F.2d at 1016 n.1. In addition, the Eleventh Circuit itself in Holley stated that "[o]ther jurisdictions have gone so far as to refuse appeals on all motions for summary judgment." Holley, 835 F.2d at 1378 n.7. Thus, the Eleventh Circuit has admitted that it is not in direct conflict with the Fifth Circuit and those in harmony with its view.

In any event, the Fifth Circuit would have reached the same result in this case even if it had followed Holley's view. Since the petitioner's motion for summary judgment was denied on "factual" grounds, the order is not reviewable.

CONCLUSION

The Petition for Writ of Certiorari is without merit. There is no meaningful conflict among the circuits on this issue. Further, even if a conflict does exist between Holley's holding and the rest of the circuits' position, the Eleventh Circuit must first more fully develop its rationale before the United States Supreme Court can justify spending its scant judicial resources on resolving this issue.

Therefore, the Petition for Writ of Certiorari should be denied.

DATED: OCTOBER 27, 1994

Respectfully submitted,

*JOHN S. HILL
DONNA M. BARNES
MITCHELL, MCNUTT,
THREADGILL, SMITH
& SAMS, P.A.
Attorneys at Law
Post Office Box 7120
Tupelo, MS 38802-7120
(601) 842-3871
Attorneys for Respondent
J. I. Case

**Counsel of Record*

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7010

MARIE BLACK, INDIVIDUALLY AND AS REPRESENTATIVE OF RANDY BLACK, PAM BLACK GUMM, KITTY BLACK, ADULTS AND WILLIAM BLACK AND TAMMY BLACK, MINORS, THE SOLE AND ONLY HEIRS-AT-LAW OF ROMIE BLACK,

Plaintiffs-Appellants

versus

J. I. CASE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi.

Before JONES, DUHÉ, and WIENER, Circuit Judges.

PER CURIAM:

In this Mississippi diversity case arising from the accidental death of Romie Black (Decedent), his successors, Plaintiffs-Appellants herein (collectively, the Blacks), appeal the adverse jury verdict absolving Defendant-Appellee J.I. Case Company, Inc. (Case) of liability. Finding that the district court committed no reversible error, we affirm.

I

FACTS

Decedent, an experienced backhoe operator, ordered a new backhoe from one of Case's retail stores. As an accommodation, Case's store operator allowed Decedent to borrow an older model Case backhoe pending delivery of the new one. A few days later while Decedent was using the borrowed machine to clear small trees and debris on sloping land, the backhoe rolled over. Decedent, who was not wearing a safety belt, struck his head on one of the support posts of the backhoe's "Rollover Protection System" (ROPS). He died shortly thereafter from injuries sustained in the accident.

The Blacks sued Case in Mississippi state court for Decedent's wrongful death, and Case timely removed the action to federal court.[1] The jury exonerated Case from liability in the death of Decedent, and a final judgment was entered to that effect. The Blacks have appealed to

---

[1]See 28 U.S.C. §§ 1332, 1441 (1988).

us from that judgment.

II

STANDARD OF REVIEW

In reviewing a jury's findings of fact, we apply the standard set out in Boeing Co. v. Shipman[2] "[A] jury verdict will not be overturned unless the 'facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable [jurors] could not arrive at a contrary verdict.'"[3] In reviewing the evidentiary rulings of the judge who presides at a jury trial we apply the abuse of discretion standard, with considerable deference.[4]

III

ANALYSIS

On appeal the Blacks quarrel extensively with the factual findings of the jury, but also proffer six claims of legal error by the district court. The Blacks assert that the district court erred by:

---

[2]411 F.2d 365 (5th Cir. 1969).

[3]LeBoeuf v. K-Mart Corp., 888 F.2d 330, 332 (5th Cir. 1989) (quoting Boeing Co., 411 F.2d at 374).

[4]See Young v. City of New Orleans, 751 F.2d 794, 797 (5th Cir. 1985).

A. Refusing to grant partial summary judgment on liability in favor of the Blacks after they showed that, as a matter of law, Case had (1) breached the implied warranty of merchantability, (2) failed to warn Decedent of the dangers inherent in the backhoe, and (3) failed to inspect the backhoe;

B. Refusing to grant a directed verdict;

C. Allowing Case to amend the pre-trial order to allege that the accident was caused by the sole negligence of Decedent;

D. Refusing to allow testimony regarding the position of the backhoe's boom at the time of the accident;

E. Instructing the jury regarding Decedent's misuse of the backhoe; and

F. Refusing to allow the jury to consider awarding punitive damages.

We now address, seriatim, the Blacks' foregoing assignments of error.

A. *Denial of Partial Summary Judgment*

The Blacks insist that there were no genuine issues of material fact regarding liability so that the district court's denial of their motion for partial summary judgment was error. But, as denial of a motion for summary judgment is interlocutory, no appeal lay at the

time the motion was denied. Consequently, the Blacks now seek review of the denial of their motion, which was unappealable when the order was issued.

The Blacks cite no authority for their proposition that an interlocutory order denying summary judgment, unappealable at the time it was issued and filed, nevertheless becomes appealable following rendition of a final judgment on the merits adverse to the movant. Neither does our independent research reveal controlling authority in this circuit on that point. Therefore, we adopt the rule of the Sixth, Ninth, and Federal Circuits that a denial of a motion for summary judgment, interlocutory and therefore unappealable at the time rendered, is not subject to review on appeal of the final judgment entered following completion of the trial.[5] Like

---

[5]Jarrett v. Epperly, 896 F.2d 1013, 1016 (6th Cir. 1990); Locricchio v. Legal Servs. Corp., 833 F.2d 1352, 1358-59 (9th Cir. 1987); Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986), cert. dismissed, 479 U.S. 1072, 107 S.Ct. 1262, 94 L.Ed.2d 124 (1987); see also Holley v. Northrop Worldwide Aircraft Servs., 835 F.2d 1375, 1377-78 (11th Cir. 1988) (restricting appeals of denied summary judgment motions if sufficient evidence was adduced for the case to go to the jury or if the evidence had been supplemented or changed in some manner favorable to the party who had opposed the motion for summary judgment); cf. Walther v. Lone Star Gas Co., 952 F.2d 119, 122-23 (5th Cir. 1992) (holding that, in the context of the Age Discrimination in Employment Act, after a trial on the merits, "a reviewing

A. Refusing to grant partial summary judgment on liability in favor of the Blacks after they showed that, as a matter of law, Case had (1) breached the implied warranty of merchantability, (2) failed to warn Decedent of the dangers inherent in the backhoe, and (3) failed to inspect the backhoe;

B. Refusing to grant a directed verdict;

C. Allowing Case to amend the pre-trial order to allege that the accident was caused by the sole negligence of Decedent;

D. Refusing to allow testimony regarding the position of the backhoe's boom at the time of the accident;

E. Instructing the jury regarding Decedent's misuse of the backhoe; and

F. Refusing to allow the jury to consider awarding punitive damages.

We now address, seriatim, the Blacks' foregoing assignments of error.

A. *Denial of Partial Summary Judgment*

The Blacks insist that there were no genuine issues of material fact regarding liability so that the district court's denial of their motion for partial summary judgment was error. But, as denial of a motion for summary judgment is interlocutory, no appeal lay at the

time the motion was denied. Consequently, the Blacks now seek review of the denial of their motion, which was unappealable when the order was issued.

The Blacks cite no authority for their proposition that an interlocutory order denying summary judgment, unappealable at the time it was issued and filed, nevertheless becomes appealable following rendition of a final judgment on the merits adverse to the movant. Neither does our independent research reveal controlling authority in this circuit on that point. Therefore, we adopt the rule of the Sixth, Ninth, and Federal Circuits that a denial of a motion for summary judgment, interlocutory and therefore unappealable at the time rendered, is not subject to review on appeal of the final judgment entered following completion of the trial.[5] Like

---

[5]Jarrett v. Epperly, 896 F.2d 1013, 1016 (6th Cir. 1990); Locricchio v. Legal Servs. Corp., 833 F.2d 1352, 1358-59 (9th Cir. 1987); Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986), cert. dismissed, 479 U.S. 1072, 107 S.Ct. 1262, 94 L.Ed.2d 124 (1987); see also Holley v. Northrop Worldwide Aircraft Servs., 835 F.2d 1375, 1377-78 (11th Cir. 1988) (restricting appeals of denied summary judgment motions if sufficient evidence was adduced for the case to go to the jury or if the evidence had been supplemented or changed in some manner favorable to the party who had opposed the motion for summary judgment); cf. Walther v. Lone Star Gas Co., 952 F.2d 119, 122-23 (5th Cir. 1992) (holding that, in the context of the Age Discrimination in Employment Act, after a trial on the merits, "a reviewing

those circuits, we hold that "[w]here summary judgment is denied and the movant subsequently loses after a full trial on the merits, the denial of summary judgment may not be appealed."[6]

B. *Denial of Directed Verdict*

The Blacks also ask us to reverse the district court's denial of their motion for a directed verdict, but this is just a request for us to review the sufficiency of the evidence. The district court should grant a motion for directed verdict if, and only if, "there is a lack of substantial evidence to support a jury verdict."[7] Or, in the words of the newly revised Federal Rules of Civil Procedure, a motion for judgment as a matter of law should be granted when "there is no legally sufficient

---

appellate court need not address the sufficiency of plaintiffs prima facie case, and may proceed directly to the ultimate question of whether plaintiff has produced sufficient evidence for a jury [finding]").

[6]Epperly, 896 F.2d at 1016. Like the Sixth Circuit, we find cases which state that "interlocutory orders merge into the final judgment and may be presented on appeal of that final judgment, but we find no case which deals specifically with the appealability of a denial of summary judgment after a full trial on the merits." Id. at 1016 n.1. Therefore, we follow these circuits and reject this appeal.

[7]Dickinson v. Auto Center Mfg. Co., 733 F.2d 1092, 1102 (5th Cir. 1983).

evidentiary basis for a reasonable jury to have found for [the nonmoving] party."[8] On appeal, we will review the sufficiency of the evidence, but only if the appellant has raised the sufficiency issue in the district court by moving for a directed verdict.[9] When we say that we are reviewing a motion for a directed verdict, then, we are actually just reviewing the sufficiency of the evidence.[10] In other words, reviewing a denial of a motion for a directed verdict made at the end of trial and reviewing the sufficiency of the evidence are one and the same thing.

In the instant case, the evidence is sufficient to support the jury verdict. In grounding their merits challenge to the sufficiency of the evidence in the contention that three key facts - the seat-locking mechanism on the borrowed backhoe was broken either before or during the rollover; any operator of that backhoe would have struck his or her head on one of the posts of the ROPS in the event of a rollover; and the seat-locking mechanism was repaired after the accident in which Decedent was fatally injured - were "undisputed," the Blacks argue that such "undisputed facts" entitled

---

[8]Fed. R. Civ. P. 50(a).

[9]See e.g., Coughlin v. Capitol Cement Co., 571 F.2d 290, 297 (5th Cir. 1978). In the absence of a motion for a directed verdict, we only inquire whether there was any evidence to support the jury's verdict, regardless of the sufficiency. Id. at 297.

[10]See Dickinson, 733 F.2d at 1102.

them to a directed verdict at the close of the evidence. They insist that, as a matter of law, those facts conclusively demonstrate a breach of the implied warranty of merchantability. We disagree, finding that such assertions by the Blacks miss the mark in several respects.

First, even if we assume for the sake of argument that those facts are "undisputed," they still do not entitle the Blacks to a directed verdict under Mississippi law. Section 75-2-314 of the Mississippi Code defines merchantable goods as those "fit for the ordinary purposes for which such goods are used."[11]In arguing that the subject facts demonstrate, as a matter of law, that the borrowed backhoe was unfit and thus unmerchantable, the Blacks completely misapprehend the relationship between these facts and the Mississippi law of merchantability. The "facts" that the seat was broken and that the operator would strike his or her head simply do not demonstrate a per se breach of the implied warranty of merchantability. At best they are evidence to be considered and weighed, along with all other admissible evidence, as proof of such a breach.

More important to our analysis here, however, is the realization that theses facts were not undisputed but were very much in dispute at the time of the Black's motion for directed verdict, just as they had been at the time of the Black's motion for partial summary judgment. The Blacks simply mischaracterize the facts as "undisputed." Thus, even if we were to review separately

---

[11]Miss. Code Ann. § 75-2-314(2)c) (1972).

the trial court's denial of the Blacks' motion for a directed verdict, we would find no error in that denial which allowed the question of liability to go to the jury on such disputed facts.

C. *Amendment to the Pretrial Order*

The Blacks insist that the district court erred in allowing Case to amend the pretrial order on the first day of the trial. The pre-trial order listed, as one of the contested issues of fact, "whether a proximate, contributing cause of the accident was the negligence of the decedent in the operation of the backhoe in any of the particulars claimed by the defendant." The court allowed Case to amend on the first day of trial to allege that Decedent's own negligence was the sole and proximate cause of his death. The Blacks assert that this change in the pretrial order made the action "a different lawsuit at trial then was anticipated by [the Blacks]."

The decision "whether to permit amendment of the pretrial order in the course of the trial is generally a matter within the discretion of the trial judge, and the appellate court will intervene only if the trial judge acted arbitrarily."[12] Generally, pretrial orders should be modified "only to prevent manifest injustice."[13] We have stated, however, that "in the interest of justice and sound

---

[12]Wallin v. Fuller, 476 F.2d 1204, 1209 (5th Cir. 1973).

[13]Canal Ins. Co. v. First Gen. Ins. Co., 889 F.2d 604, 609 (5th Cir. 1989).

judicial administration, an amendment of a pretrial order should be permitted where no substantial injury will be occasioned to the opposing party, the refusal to allow the amendment might result in injustice to the movant, and the inconvenience to the court is slight."[14]

Applying this reasoning to the instant case, we are satisfied that the district court did not err in allowing the pretrial order to be amended - i.e., the district court did not abuse its discretion. We do not agree with the Blacks' assertion that the amendment dramatically changed the character of the lawsuit. The Blacks obviously anticipated the need to counter Case's assertions of Decedent's comparative negligence, and they must have been aware that Case's theory of the lawsuit, which was later accepted by the jury, was that the accident was entirely the Decedent's fault. We do not find that allowing the amendment to the pretrial order caused"substantial injury" to the Blacks' presentation of their case to the jury, and we therefore reject the assertion of reversible error by the district court in allowing the amendment.

D. *Refusal to Admit Testimony on Boom Shift*

The Blacks next assert as error the trial court's refusal to admit testimony to the effect that the backhoe's boom shifted, thereby creating instability and causing it to roll over. In their brief to this court, the Blacks failed to

---

[14]Sherman v. United States, 462 F.2d 577 (5th Cir. 1972) (citing Central Distrib., Inc. v. M.E.T., Inc., 403 F.2d 943, 946 (5thCir. 1968)).

address our standard of review of a trial court's ruling on admissibility of such evidence. This court will not "disturb a district court's ruling, disallowing the witness's testimony, absent a showing of clear abuse of the broad discretion vested in the district court on this issue."[15] The Blacks make no effort to inform us how the district court's refusal to admit the questioned testimony constituted an abuse of discretion. Instead, they merely complain in the abstract about the potential effect that the subject testimony could have had on the outcome of the case if that testimony had been heard by the jury. Without substantial support, such a complaint is pure conjecture and therefore insufficient to overcome the broad discretion allowed the district court in such evidentiary rulings. The court's refusal to admit testimony about a shift in the backhoe's boom was not an abuse of discretion.

E. *Jury Instructions Regarding Misuse of the Backhoe*

The Blacks complain stridently about the district court's instruction to the jury regarding Decedent's alleged misuse of the backhoe. As we understand their counsel's brief, this complaint is not the usual objection to the wording of an instruction. Rather, the Blacks quarrel with the court's giving the jury any instruction whatsoever concerning even the slightest possibility that Decedent

---

[15] Young v. City of New Orleans, 751 F.2d at 797 (citing Bennett v. City of Slidell, 697 F.2d 657, 662 (5th Cir. 1983)); see Howard v. City of Greenwood, 783 F.2d 1311, 1313 n.2 (5th Cir. 1986).

might have operated the backhoe negligently. Candidly, we are at a loss to understand counsel's objection and can only conclude that he is confused about how the trial process works. Certainly the trial court instructed the jury regarding Case's allegations and evidence that the Decedent misused the backhoe; that was, after all, the gravamen of the defense's theory of how and why the accident occurred. Case's pre-trial order lists Decedent's misuse of the backhoe as one of the assertions Case intended to prove.

More to the point, however, is our inability to find anywhere in the record of this case that the Blacks preserved this claim of error. Neither does the Blacks' reply brief point out the location in the record of any such objection, even though the very existence of such an objection was expressly questioned in Case's brief to this court. The Blacks must know that we will not consider on appeal any allegation of error regarding a jury instruction unless the aggrieved party has properly preserved its right to complain by making a timely objection to such instruction in the trial court.[16]

F. *Punitive Damages*

Finally, the Blacks assert that the district court erred in refusing to instruct the jury as to recovery of punitive damages. In light of our rejection of all other assignments of error by the Blacks, and our affirmation of the jury's verdict and the final judgment rendered in

---

[16]Fed. R. Civ. P. 51.

accordance therewith, the issue of punitive damages is moot.

IV

CONCLUSION

As the Blacks failed to prevail before the jury on the merits of their case, we are not constrained to review the trial court's interlocutory denial of the Blacks' motion for partial summary judgment. In adopting this position, we join the three circuits above identified. In like manner, we do not review the district court's denial of the Blacks' motion for directed verdict separately and apart from our review, on the merits, of the sufficiency of the evidence to support the jury's verdict. And, for the reasons set forth above, we find no merit in any of the remaining points raised by the Blacks and complained of by them as reversible errors of law on the part of the trial court. Finally, finding no reversible error in the jury's determinations of fact, and concluding that the facts thus found by the jury are supported by the evidence, we affirm the jury's verdict and the district court's final judgment based thereon.

AFFIRMED.